

Delarian K. Wilson,  
Petitioner  
v.  
Nevada Department  
Respondents

**Order Dismissing Petition as Untimely**  
[ECF Nos. 9, 21, 24]

## Discussion

On March 28, 2008, Wilson pleaded guilty to two counts: robbery with the use of a deadly weapon and sexual assault,<sup>3</sup> and the judgment of conviction was entered four months later.<sup>4</sup> The Nevada Supreme Court affirmed Wilson's convictions the following year and remittitur issued on August 4, 2009.<sup>5</sup> Wilson filed his state postconviction petition in October 2011, which was denied as untimely and, in the alternative, on the merits.<sup>6</sup> Wilson moved for clarification and reconsideration of that denial, and the Court, once again, denied the petition as

<sup>6</sup> ECF No. 12-13.

1 untimely.<sup>7</sup> Wilson appealed that decision, but he voluntarily withdrew the appeal, so the Nevada  
2 Supreme Court dismissed it on May 14, 2014.<sup>8</sup> After Wilson’s second attempt at appealing the  
3 denial of his state-court petition, the Nevada Supreme Court affirmed the dismissal on October  
4 16, 2016, and remittitur issued three weeks later.<sup>9</sup> Wilson mailed his federal habeas petition for  
5 filing on April 24, 2017.<sup>10</sup>

6 **B. Statute of limitations**

7 The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a one-year  
8 limitations period for filing a federal habeas corpus petition.<sup>11</sup> The one-year period begins to run  
9 from the date on which a petitioner’s judgment became final upon conclusion of direct review or  
10 when the time for seeking direct review expires.<sup>12</sup> A properly filed petition for state  
11 postconviction relief can toll the period of limitations.<sup>13</sup>

12 “[T]he process of direct review . . . includes the right to petition [the United States  
13 Supreme Court] for a writ of certiorari.”<sup>14</sup> Supreme Court Rule 13 provides that “a petition for a  
14 writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of  
15 last resort . . . is timely when it is filed . . . within 90 days after entry of the judgment” or “if a  
16 petition for rehearing is timely filed . . . from the date of the denial of rehearing.”<sup>15</sup> The one-year  
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20 <sup>7</sup> ECF No. 13-20.

21 <sup>8</sup> ECF Nos. 13-23, 14-2, 14-3.

22 <sup>9</sup> ECF Nos. 14-25, 14-26.

23 <sup>10</sup> ECF No. 4.

24 <sup>11</sup> 28 U.S.C. § 2244(d).

25 <sup>12</sup> 28 U.S.C. § 2244(d)(1)(A).

26 <sup>13</sup> 28 U.S.C. § 2244(d)(2).

27 <sup>14</sup> *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

28 <sup>15</sup> Supreme Court Rule 13.

1 period of limitations begins to run when the Supreme Court affirms a conviction on the merits,  
2 denies a petition for a writ of certiorari, or the 90 days expires.<sup>16</sup>

3 A petitioner may be entitled to equitable tolling if he can show “‘(1) that he has been  
4 pursuing his right diligently, and that (2) some extraordinary circumstance stood in his way’ and  
5 prevented timely filing.”<sup>17</sup> Equitable tolling is “unavailable in most cases,”<sup>18</sup> and “the threshold  
6 necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule.”<sup>19</sup> The  
7 petitioner ultimately has the burden of proof on this “extraordinary exclusion.”<sup>20</sup> He must  
8 demonstrate a causal relationship between the extraordinary circumstance and the lateness of his  
9 filing.<sup>21</sup> Ignorance of the one-year limitations period does not qualify as an extraordinary  
10 circumstance.<sup>22</sup>

11 **C. Wilson’s petition is time barred.**

12 Respondents argue that Wilson’s petition is untimely because more than 2,750 days  
13 (seven and a half years) of untolled time passed before Wilson filed his federal petition.<sup>23</sup>  
14 Wilson’s 90 days to file a petition with the United States Supreme Court began to run on July 7,  
15 2009, and expired on October 5, 2009, at which point AEDPA’s one-year limitations period  
16 began to run, making October 5, 2010, the deadline to file a federal habeas petition absent  
17 tolling. Wilson didn’t even file his state habeas petition until October 2011 or his federal habeas  
18 petition until April 2017.

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20 <sup>16</sup> See *Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009).

21 <sup>17</sup> *Holland v. Florida*, 560 U.S. 631, 649 (2009) (quoting prior authority).

22 <sup>18</sup> *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999).

23 <sup>19</sup> *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting *United States v. Marcello*,  
24 212 F.3d 1005, 1010 (7th Cir. 2000)).

25 <sup>20</sup> *Id.* at 1065.

26 <sup>21</sup> See, e.g., *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003).

27 <sup>22</sup> See *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006).

28 <sup>23</sup> ECF No. 9 at 4–6.

1 Wilson's federal petition is therefore time barred unless he can demonstrate that he is  
2 entitled to equitable tolling. Wilson argues that his counsel was ineffective for failing to tell him  
3 that remittitur had issued. But he acknowledges that he knew that his conviction had been  
4 affirmed at least as early as July 2010, which was within the one-year limitations period, and he  
5 waited almost another 18 months before filing his state habeas petition. His state petition's  
6 pendency cannot serve as a basis for tolling because the federal period had already expired  
7 before he filed it. And he fails to demonstrate a basis for tolling the period prior to his state-  
8 court filing.


9 **Conclusion**

10 Accordingly, IT IS HEREBY ORDERED that respondents' motion to dismiss this  
11 petition as untimely [ECF No. 9] is **GRANTED**. Wilson's petition is **DISMISSED with**  
12 **prejudice**. And because reasonable jurists would not find my decision to dismiss this seven-  
13 and-a-half-years-late petition as untimely to be debatable or wrong, I decline to issue a certificate  
14 of appealability.

15 All other pending motions [ECF Nos. 21, 24] are **DENIED as moot**.

16 The **Clerk of Court** is directed to **ENTER JUDGMENT accordingly and CLOSE**  
17 **THIS CASE**.

18 Dated: June 28, 2018

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20 U.S. District Judge Jennifer A. Dorsey  
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